TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~209.~~ 78

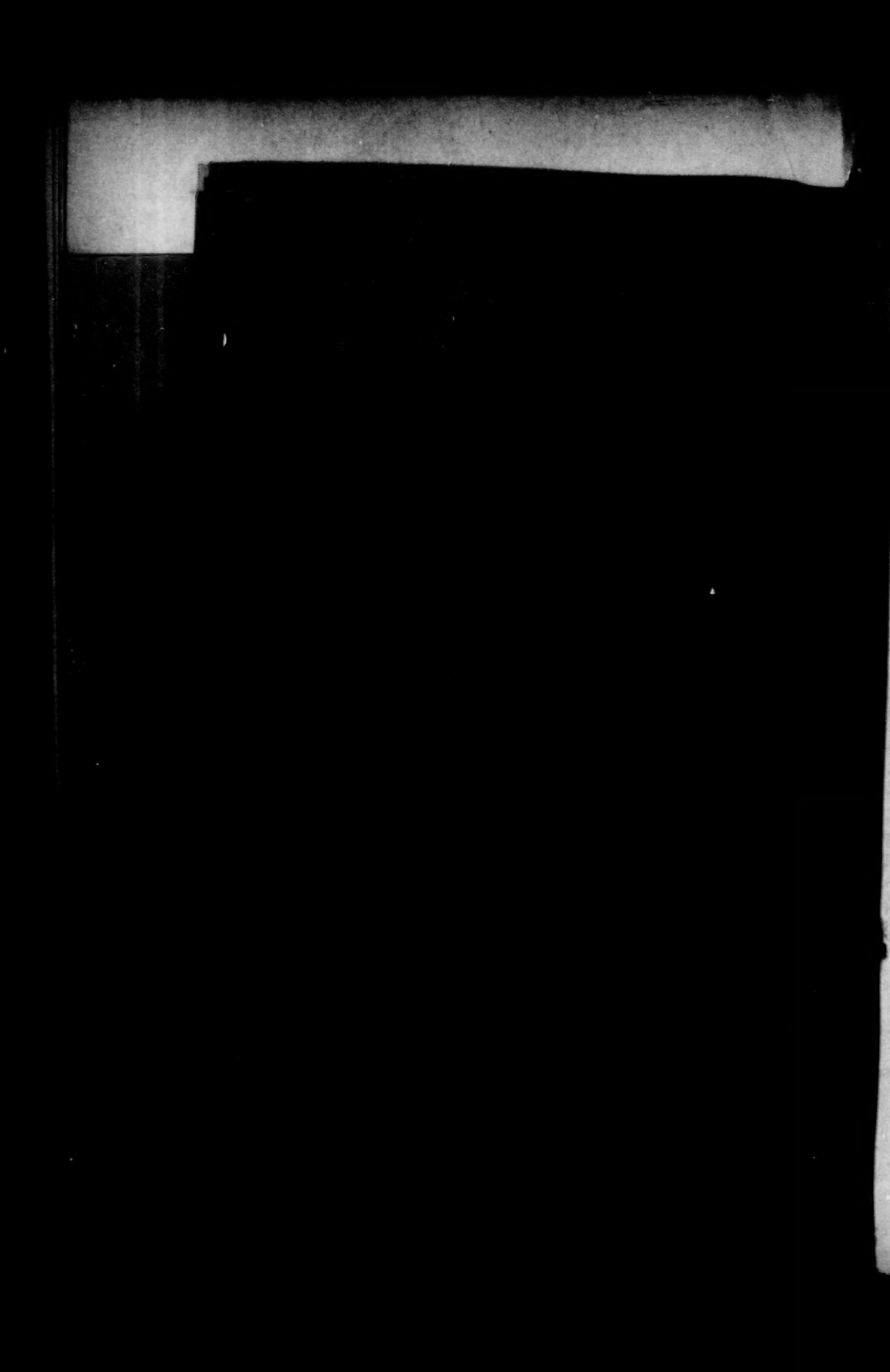
THE MAYOR AND CITY COUNCIL OF BALTIMORE, PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED OCTOBER 11, 1869.



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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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To the honorable the judges of the circuit court of the United States for the district of Maryland:

The petition of the Baltimore and Ohio Railroad Company represents that a suit has been commenced by the Mayor and City Council of Baltimore against your petitioners in the superior court for Baltimore City, the object of which is to recover from your petitioners certain sums of money withheld by them out of certain interest payable by them to the said Mayor and City Council upon certain bonds of the said Mayor and City Council, issued under circumstances which are truly set forth in the narr. or declaration filed in the said court, and which sums of money have been in fact retained by your petitioners and paid over as taxes due to the United States under the decision of the Commissioner of Internal Revenue of the United States, and to avoid the compulsory process to collect the same authorized by "the act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes."

That the question that would have to be decided in the superior court aforesaid would be, whether the petitioners, the defendants, acting under color of the revenue laws of the United States, and setting up a right to make such payment of taxes under such laws, were justifiable in doing so or not — a question involving necessarily the contruc-
4 tion of said revenue laws, which, by the laws of the United States in such cases made and provided, is a question to be decided by this honorable court.

Wherefore your petitioners respectfully pray that a writ of certiorari may be directed by this honorable court to be issued to the said superior court, requiring it to send to this honorable court the record and proceedings in the said cause, that such proceedings may be had in this court as are proper under the circumstances.

JOHN H. B. LATROBE,
Counsel for the Petitioners.

STATE OF MARYLAND, *Baltimore City, to wit:*

Be it remembered, and it is hereby certified, that on this eighteenth day of October, 1864, before the subscriber, a United States commissioner, personally appeared John W. Garrett, president of the Baltimore and Ohio Railroad Company, and made oath, according to law, that the matters and things in the above petition set forth are just and true to the best of his knowledge, information, and belief.

JOHN HANAN,
U. S. Commissioner.

[U. S. 5 cents revenue stamp.]

I, John H. B. Latrobe, attorney-at-law, practicing in the superior court of Baltimore City, as well as in the circuit court of the United States for the Maryland district, do hereby certify that as counsellor for the Baltimore and Ohio Railroad Company, the above-named petitioners,
5 I have examined the proceedings against them, and have carefully examined into the matters set forth in the petition, and I believe them to be true.

JOHN H. B. LATROBE,
Attorney for Petitioners.

At which said first Monday in November, to wit, in the year last aforesaid, and the return day of the foregoing writ, the judge of the superior court of Baltimore City aforesaid certify and transmit to the

circuit court here, in obedience to the command of the said writ, a record of the proceedings in the plea aforesaid before him had, together with the said writ; and which said record of the proceedings aforesaid is in the words and of the tenor following, to wit:

Record.

STATE OF MARYLAND, *City of Baltimore, to wit:*

At a session of the superior court of Baltimore City, in the thirteenth judicial circuit of the State of Maryland, begun and held at the court-house in and for the city aforesaid, on the second Monday in September, in the year of our Lord one thousand eight hundred and sixty-four—present, the Honorable Robert N. Martin, judge; John J. Danaker, esq., sheriff; Alford Mace, clerk—among other, were the following proceedings, to wit:

6 THE MAYOR AND CITY COUNCIL OF BALTIMORE
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the third day of September, in the year of our Lord one thousand eight hundred and sixty-four, the said the Mayor and City Council of Baltimore, by William Price, esquire, its attorney, prosecuted and sued forth out of the superior court here the writ of the State of Maryland of summons to the sheriff of Baltimore City aforesaid, directed, in the words and of the tenor following, to wit:

BALTIMORE CITY, *to wit:*

The State of Maryland to the sheriff of Baltimore City, greeting:

{ SEAL'S PLACE. } You are hereby commanded to summon the Baltimore and Ohio Railroad Company of Baltimore City, to appear before the superior court of Baltimore City, to be held at the court-house in the same city, on the second Monday of September next, to answer an action at the suit of the Mayor and City Council of Baltimore; and have you then and there this writ. Witness the Honorable Robert N. Martin, judge of the said court, the third day of September, 1864.

ALFORD MACE, *Clerk.*

And the said plaintiff, by its said attorney, on the day of prosecuting and suing forth of the aforegoing writ, declared against the said defendants in the plea aforesaid, in form following, to wit:

STATE OF MARYLAND, *Baltimore City, to wit:*

7 The Mayor and City Council of Baltimore, by Wm. Price, their attorney, sue the Baltimore and Ohio Railroad Company, a corporation chartered by this State, for that, whereas, by an ordinance of the said Mayor and City Council, passed on the 27th day of September, 1853, it was, amongst other things, provided that whenever the said defendant should in the mode therein provided signify in writing, and under its corporate seal, its acceptance of the terms and provisions of the said ordinance, and should at the same time deposit with the register of the city a mortgage pledging all the real and personal estate of the said company, their road or roads, with their tolls and revenues, as security to the plaintiffs for the payment, as thereinafter

provided, of the principal and interest of the loan hereby made, it should be the duty of the commissioners of finance of the said city to issue certificates of stock of the Mayor and City Council of Baltimore, with coupons, or otherwise, in their discretion, to the amount of five millions of dollars, redeemable on the first day of January, 1890, the interest payable quarterly on the first day of January, April, July, and October in each year, the commissioners to use their discretion whether to issue five per cent. sterling bonds, or six per cent. currency bonds, payable in Baltimore, and should proceed to sell the said bonds or certificates on the best terms they could obtain, not less than par, and pay over the proceeds thereof to the register of the city, the said commissioners having elected to issue six per cent. currency bonds, and the city register was by the said ordinance authorized to pay to the defendant the amount of money he might receive from time to time from the said commissioners of finance on account of the sale of the said certificates, reserving ten per cent. thereof to be used as a sinking fund to
8 pay the principal of their said loans at maturity; and whereas it was also provided by the said ordinance that the acceptance thereof by the said company in the manner therein provided, and the execution of the mortgage required to be given by the defendants as aforesaid, should be construed and understood as obliging the said company to pay to said register the principal sum of five millions of dollars issued under the provisions of the said ordinance, less the amount of the said sinking fund and its accumulations in the manner therein provided, and also to pay to the said city register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds so issued quarterly and in advance at least ten days previous to the days of the several months aforesaid on currency bonds, which said payments should commence to be made in advance of the first payments which should be required to be made by the plaintiffs on said certificates or bonds, and should continue to be made as aforesaid until the repayment by the defendant to the plaintiffs of the principal sums of money which should be issued as aforesaid; and whereas the said advance was by an act passed by the general assembly of Maryland, on the first day of March, 1854, chap. 34, was confirmed and full power thereby conferred on the plaintiffs and upon the commissioners of finance, and the register of the said city to carry into effect all the provisions of the said ordinances, in the same manner, to all intents and purposes, as if the said Mayor and City Council had been previously to the passage of the said ordinance authorized and empowered by an of the general assembly of Maryland to enact an ordinance in the precise terms of the
9 ordinance above recited at length, and to provide for carrying the same into effect, the said act to take effect from its passage; and the plaintiffs further in fact say that the defendant did signify in writing, under its corporate seal, its acceptance of the terms and conditions of the said ordinance, and did at the same time deposit with the register of the city a mortgage pledging all the real and personal estate, roads, tolls, and revenues, as security to the Mayor and City Council of Baltimore for payment, as therein provided, of the principal and interest of the said loan of five millions of dollars, and the proceeds of the said certificates or bonds, amounting in all to five millions of dollars, less the said sinking fund, was paid over to and received by the defendant, and all the conditions, stipulations, and provisions of the said ordinance having been fully complied with and performed, the defendant, by force of the provisions, become bound to pay to the plaintiffs the interest upon the said loan of five millions of dollars, at the rate of six

per centum per annum, quarterly, at the days and time before mentioned; that is to say, the said defendant became bound to pay to the plaintiffs the sum of three hundred thousand dollars per annum until the first day of January, 1890, in quarterly payments of seventy-five thousand dollars, at the days and times mentioned in the said ordinance, of all which said premises the said defendant, after the making of the said ordinance, and the confirmation thereof, by the general assembly of Maryland, and after the execution and delivery of the said mortgage, and after the compliance with and performance of the conditions,
10 stipulations, and provisions of the said ordinance, as aforesaid, had notice; by means whereof the said defendant became liable to pay, and ought to have paid, to the plaintiffs, ten days before the first day of October, 1862, and also ten days before the first day of January, 1863, and also ten days before the first day of April, 1863, and also ten days before the first day of July, 1863, and also ten days before the first day of October, 1863, and also ten days before the first day of January, 1864, and also ten days before the first day of April, 1864, and also ten days before the first day of July, 1864, and at and upon each and every of said days and times, the sum of seventy-five thousand dollars for interest accruing and due on said loan, whereby and by reason of the said several sums of money being and remaining wholly unpaid, an action hath accrued to the said plaintiffs to have and demand of the defendant the said several sums of money, payable as aforesaid; and whereas also the plaintiffs heretofore, to wit, on the first day of December, 1853, did loan to the defendant, and the defendant did borrow from the plaintiffs, the sum of five millions of dollars, and did engage and promise to pay the interest at six per cent. per annum to accrue thereon quarterly ten days prior to the first days of January, April, July, and October, yearly, and every year, until the first day of January, 1890, when the principal of the said debt was, by the terms of the said loan, to be paid, which said loan was provided for upon the terms aforesaid, by an ordinance of the Mayor and City Council of Baltimore, passed on the 27th day of September, 1853, the said ordinance having been ratified
11 and confirmed by an act of the general assembly of Maryland passed on the 1st day of January, 1854, chap. 34, and the said ordinance and all the provisions and details thereof made as valid to all intents and purposes as if the said plaintiffs had been, previously to the passage thereof, authorized and empowered by an act of the general assembly of Maryland to enact the same. And the said sum of five millions of dollars having been loaned and advanced to the said defendants and the same having been received by it upon the terms and conditions mentioned in the said ordinance, the said defendant, in consideration thereof, undertook, agreed, and promised to pay to the plaintiffs, and ought to have paid to the plaintiffs, the sum of seventy-five thousand dollars on each of the several days and times following; that is to say, ten days before the first day of October, 1862, ten days before the first day of January, 1863, ten days before the first of April, 1863, ten days before the 1st July, 1863, ten days before the 1st of October, 1863, ten days before the first of January, 1864, ten days before the 1st of April, 1864, and at and upon each and every of said days and times, the same being the interest accruing on the said loan, according to the terms of the said loan; yet the said defendant, although often requested so to do, hath not as yet paid the said several sums of money to either of them the said plaintiffs, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to wit, at Baltimore City

aforesaid, to the damage of the said plaintiffs fifty thousand dollars current money, which sum the plaintiffs claim in this suit.

WM. PRICE,
Att'y for Plaintiffs.

12 A copy of which declaration was made and sent with the said writ to the sheriff of Baltimore City aforesaid, thereon endorsed, "To be served on defendant."

At which mentioned second Monday of September, to wit, in the year last aforesaid, being the return day of the aforegoing writ, comes again in the superior court here the said plaintiff, by its attorney aforesaid, and the sheriff of the city aforesaid, to whom the said writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Summons, copy left.

"JOHN J. DANAKER, *Sheriff.*"

And the said defendant being called appears in court here by John H. B. Latrobe, esq., its attorney.

And thereupon, in pursuance of the notice aforesaid, it is ruled by the court here, on motion of the said plaintiff, by its attorney aforesaid, that the said defendants plead to the declaration aforesaid within the ensuing fifteen days, or judgment by the court will be rendered against it in default thereof.

And afterwards, to wit, on the twenty-fourth day of October, in the year last aforesaid the following writ of "certiorari" issued out of the circuit court of the United States for Baltimore City, and was filed in said cause, commanding the superior court to send, under its seal, the record of the proceeding in the plea aforesaid, with all things touching the same, by whatever names the parties aforesaid in the plea
13 aforesaid may be called, unto the said circuit court of the United States for Baltimore City, to be held at the city of Baltimore on the first Monday in November next; which said writ is in the words and of the following tenor, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the judge of the superior court of Baltimore City, greeting:

{SEAL'S PLACE.} Whereas, lately in the said superior court of Baltimore City, a certain Baltimore and Ohio Railroad Company was summonded to answer the Mayor and City Council of Baltimore, in a plea, &c., which said plea, as it is said, is still depending before you in the said superior court undetermined, and the circuit court of the United States for the fourth circuit in and for the Maryland district, being desirous, for certain reasons, that the record of proceedings in the plea aforesaid should by you be certified to them, you are hereby commanded to send, under your seal, the record of the proceedings aforesaid in the plea aforesaid, with all things touching the same, by whatever names the parties aforesaid in the plea aforesaid may be called, into the said circuit court of the United States, to be held at the city of Baltimore on the first Monday in November next, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit

court of the United States may be able thereon to proceed and to do what shall appear to them ought to be done.

Witness the Honorable R. B. Taney, Chief Justice of our Su-
14 preme Court, this first Monday in December, in the year of our Lord one thousand eight hundred and sixty-three.

Issued 21st October, 1864.

JAS. W. CHEW, *Clk Circuit Court.*

J. H. B. L.

It is thereupon ordered by the superior court of Baltimore City that a transcript of the record of proceedings in the cause aforesaid, with all things thereunto relating, be transmitted to the said circuit court of the United States for Baltimore City, to be held at the city of Baltimore on the first Monday in November next.

And the same is transmitted accordingly.

In testimony that the within and aforegoing is truly taken from the record of proceedings of the superior court of Baltimore City, I have hereunto subscribed my name and affixed the seal of the superior court of Baltimore City, this third day of November, A. D. 1864.

{ SEAL'S PLACE. }

ALFORD MACE,
Clk Superior Court, Baltimore City.

[U. S. 5 cts. stamp.]

And now here, at this day, to wit, on the first Monday in November, in the year last aforesaid, come into the circuit court here, as well the said Mayor and City Council of Baltimore, by William Price, esq., its attorney, as the said Baltimore and Ohio Railroad Company, its attorney.

And the said Baltimore and Ohio Railroad Company, by its
15 attorney aforesaid, comes and defends the wrong and injury, when, &c., and says that it did not undertake or promise in manner and form as the said plaintiff hath above complained against it; and of this it puts itself upon the country, &c., and the said plaintiff doth the like.

Whereupon, for trying the issue aforesaid between the parties aforesaid within joined, it is ordered by the court here that a jury thereon appear before the court held immediately, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c. Thereupon it is ordered, by the court here, that twenty persons from the pannel of petit jurors returned to the court here by the marshal of the Maryland district aforesaid, be drawn by ballot, and thereupon the twenty persons being so drawn by ballot and written upon two lists, one of which said lists is delivered to the counsel for the respective parties, and the counsel for each of the said parties having stricken out four persons from the said lists; thereupon the remaining twelve persons being called, come, to wit: David Martin, John Bangs, Adolph Van Ruth, Edward R. Sparks, James Burnside, John Peregoy, James N. Burnham, Wm. R. Sanderson, Joseph G. Brewer, David E. Price, Henry E. England, and John Smith, who, being empannelled and sworn to say the truth in the premises, upon their oaths do say that the said defendant did not undertake and promise in manner and form as the said plaintiff hath above complained against it. Therefore, it is considered by the court here that the said Mayor and City Counsel of Baltimore take nothing by its said writ, but that it be in mercy for its false complaint, and that the said Baltimore and Ohio Railroad Company go thereof without day, &c. It also considered by the court here that the said Baltimore

16 and Ohio Railroad Company do recover against the said the Mayor and City Council of Baltimore the sum of twenty-six dollars and eighty cents, for its costs and charges by it about its defence in this behalf sustained, to the said Baltimore and Ohio Railroad Company by the court here now adjudged, according to the form of the statute in such cases made and provided, and that the said Baltimore and Ohio Railroad Company have thereof its execution, &c.

MEMORANDUM.—Before the jurors aforesaid withdrew from the bar of the court here the said Mayor and City Council of Baltimore, by its attorney aforesaid, tendered to the court here the following bill of exception, and which is by the court here signed and sealed, and which is in the form following, to wit:

In the circuit court of the United States for the Maryland district.

THE MAYOR AND CITY COUNCIL OF BALTIMORE }
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. }

The plaintiff and defendant, by their respective counsel, to obviate the necessity of proof of the different matters necessary to raise the questions involved in the issue, made the following admission of facts, and which were read to the jury accordingly:

Admission of facts.

In the circuit court of the United States for the Maryland district.

THE MAYOR AND CITY COUNCIL OF BALTIMORE }
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. }

It is agreed, 1. That the Mayor and City Council of Baltimore, having full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27th, 1853, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the
17 amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore."

2. That said ordinance may be read in evidence on the trial of the above cause, from the printed ordinances of the city.

3. That in pursuance of the provisions of the said ordinance, the certificates of stock of the Mayor and City Council of Baltimore, and the payments provided for in the 2nd section, were made to the defendants, reserving the ten per cent. to be used as a sinking fund.

4. That the Baltimore and Ohio Railroad Company have, since the issue of said certificates of stock, paid regularly to the register of the city of Baltimore the interest on the whole amount of five millions dollars, issued under the said ordinance, agreeable to the terms of said ordinance, until the first day of July in the year 1863.

5. That since the date last aforesaid the said company, in paying the interest on the said certificates to the said register, have deducted three per cent. therefrom, which deduction they have paid to the Commissioner of Internal Revenue of the United States, upon his peremptory demand

therefor, he insisting that he was entitled thereto upon a proper construction of the acts of Congress of the United States, to provide internal revenue to support the government, &c.

6. That the payments thus made to the Commissioner of Internal Revenue were not made until after repeated correspondence, in which the defendants sought to prove that he was wrong in making the demand, and was only paid to avoid the consequences provided for in the act, in case of refusal.

18 7. That the payments thus made to the register, and withheld from the plaintiffs, amount at this time to the sum of $18,000, which this action is brought to recover as being withheld without authority, and in violation of the obligations entered into by the company, not only in accepting said ordinance and receiving the proceeds, less ten per cent. of the sales of the stock certificates, but in executing the mortgage provided for in the said ordinance, and which it is admitted was duly executed on the 16th February, 1854, and which it is agreed may be read in evidence from the original paper or a certified copy.

Mortgage.

The Baltimore and Ohio Railroad Company mortgage to the Mayor and City Council of Baltimore.

This indenture, made this sixteenth day of February, in the year eighteen hundred and fifty-four, between the Baltimore and Ohio Railroad Company, of the first part, and the Mayor and City Council of Baltimore, of the second part:

Whereas an ordinance was enacted on the twenty-seventh day of December, 1853, an entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," the tenth section of which ordinance enacted that it should have no effect until confirmed by the general assembly of Maryland then next ensuing the date of said ordinance; and whereas at the present January session of the year 185[illegible] an act has been passed by the general assembly, entitled

"An act to confirm an ordinance of the Mayor and City Council

19 of Baltimore, entitled 'An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debt, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore, and to confer upon said Mayor and City Council, and upon the commissioners of finance, and the register of said city, the powers necessary for carrying into effect the provisions of the said ordinance," by which said act of the general assembly the same validity was given to the said ordinance as if the said Mayor and City Council had been, previously to the passage of the said ordinance, authorized and empowered by an act of the said general assembly to enact an ordinance in the precise terms of the ordinance above recited, and at length, and to provide for carrying the same into effect, the said act so as aforesaid passed, stipulating that nothing therein or in said ordinance contained should be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland had in the revenue of the said Baltimore and Ohio Railroad Company, for loans heretofore made by the said State to said company, or for the interest due, or that might become due thereon, to the said State; and whereas the said Baltimore and Ohio Railroad Company, by their officers legally authorized

to act on their behalf in such matters, having signified in writing, sealed with their corporate seal, their acceptance of the terms and provisions of said ordinance, as required to do by the first section thereof, do now propose to deposit with the register of the said city a mortgage, (previously to be approved by the city councellor,) wherein they shall pledge all their real and personal estate, road or roads, the tolls and revenues, as security to the said Mayor and City Council, for the payment, as provided in the said ordinance of the principal and interest of the loan, made by said ordinance.

Now, this indenture witnesseth that the Baltimore and Ohio Railroad Company, for and in consideration of the premises, and for the purpose of fully complying on their part with the requisitions, in all respects, of the said ordinance and act of assembly, and in further consideration of the sum of five dollars, to them in hand paid by the said Mayor and City Council of Baltimore, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, assigned, transferred, and made over, to the Mayor and City Council of Baltimore aforesaid, all their the said Baltimore and Ohio Railroad Company's real and personal estate, road or roads, the tolls and revenues, with the appurtenances, to have and to hold the said real and personal estate, road or roads, the tolls and revenues, with the appurtenances, to the said the Mayor and City Council of Baltimore, in as full and ample a manner as the said Baltimore and Ohio Railroad Company are entitled to have, and to hold the same as security to the Mayor and City Council of Baltimore for the payment, as provided in the ordinance aforesaid, of the principal and interest of the loan made thereby; provided, nevertheless, and it is the true intent and meaning of the parties to these presents, that if the said Baltimore and Ohio Railroad do and shall pay to the register aforesaid the principal sum of five millions of dollars, issued under the provisions of the said ordinance, less the amount of the sinking fund provided for therein, and its accumulations, mentioned in the third section of the said ordinance, at least once a month before the day on which the certificates or bonds, directed by said ordinance to be issued, shall become redeemable, and shall also pay to the said register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds issued quarterly, and in advance at least ten days previous to the first days of the several months mentioned in said ordinance, on currency bonds, and thirty day previous to aforesaid first days on sterling bonds, which said payment shall commence to be made in advance of the first payments of interest which shall be required to be made by the Mayor and City Council of Baltimore on said certificates or bonds, and shall continue to be made as aforesaid until the repayment by the said company to the Mayor and City Council of Baltimore of the principal sums of money which shall or may be issued as aforesaid; and if the said Baltimore and Ohio Railroad Company do and shall well and truly, in the event of the said commissioners of finance electing to issue 5 per cent. sterling bonds, pay all other expenses incidental to such payment, as well as all and any expense incidental to the issue of any of the bonds, whether currency or sterling, as aforesaid, and shall pay the expense of recording, under direction of the city register, this indenture of mortgage in the proper offices of record where such instruments are recorded, in all counties, districts, cities, or towns, whether in the State of Maryland, or out of it, wherein said company have any real or personal estate, road or roads, tolls or revenues, then and in these events these presents shall be null and void; else to remain in full force and effect. It being understood that until a failure to comply with

their obligation in the premises, the said Baltimore and Ohio Railroad Company shall be permitted to have and enjoy the possession of the property hereby mortgaged, and to receive and take the income and rev enues thereof.

And this indenture further witnesseth that the said Baltimore and Ohio Railroad Company hath appointed, and by these presents doth hereby appoint, Joshua J. Atkinson as their attorney to acknowledge this indenture to be their act and deed, to the end that the same may be recorded according to law.

In testimony whereof, the president of the said company hath hereto set his hand and caused the seal of the said company to be affixed hereto the day and year first above written.

WM. G. HARRISON, { SEAL'S PLACE. }
Pres't B. & O. R. R. Co.

Signed, sealed, and delivered in the presence of—

JOHN H. B. LATROBE.
JOSEPH J. ATKINSON.
WM N. BRICE.
EDW'D J. PETERS.

STATE OF MARYLAND, *Baltimore City, to wit:*

On this 16th day of February, in the year 1854, before the subscribers, two justices of the peace of the said State, in and for said city, personally appeared Joshua J. Atkinson, who, we are satisfied of our
23 own knowledge, is the party named and described as the attorney in the foregoing indenture named, and in pursuance of the authority therein given, acknowledge the same indenture to be the act and deed of the Baltimore and Ohio Railroad Company. And at the same time, before us personally appeared John J. Graves, an officer of the corporation of the Mayor and City Council of Baltimore, and register thereof, and made oath according to law, that the consideration set forth in the indenture of mortgage aforesaid is true and bona fide as therein set forth.

Acknowledged before—

WM. N. BRICE.
EDW'D J. PETERS.

I approve of the foregoing mortgage.

BENJ'N C. PRESSTMAN,
Counsellor for the City.

STATE OF MARYLAND, *City of Baltimore, ss:*

I, James B. Latimer, a commissioner, appointed by the governor of the State of Virginia, for the State of Maryland aforesaid, do certify that William G. Harrison, president of the Baltimore and Ohio Railroad Company, whose name is signed to the writing above, bearing date the sixteenth day of February, eighteen hundred and fifty-four, has acknowledged the same in my State aforesaid.

{ SEAL'S PLACE. } In testimony whereof, I have hereunto subscribed my name and affixed my seal of office as commissioner aforesaid, this sixteenth day of February, eighteen hundred and fifty-four.

JAS. B. LATIMER, *Commissioner.*

24 STATE OF MARYLAND, *Baltimore City, sct:*

I hereby certify that William N. Brice and Edward J. Peters, esquires, before whom the annexed acknowledgment and affidavit were

made, and who have thereto subscribed their names, were, at the time of so doing, two justices of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof, I hereto set my hand and affix the seal [SEAL.] of the superior court of Baltimore City, this 16th day of February, A. D. 1854.

EDW'D DOWLING,
Clerk of the Superior Court of Baltimore City.

Rec'd, 16th February, 1854, of grantee, six dollars in lieu of stamp, under act 1846, ch. 61.

EDW'D DOWLING, *Clerk.*

Received to be recorded the 16th day of February, 1854, at 5 o'clock p. m. Same day recorded and examined.

Per EDW'D DOWLING, *Clk.*

STATE OF MARYLAND, *City of Baltimore, set:*

I hereby certify that the aforegoing is truly transcribed from Liber E. D., No. 49, folio 230, &c., one of the land records of Baltimore City.

In testimony whereof, I hereto set my hand and affix the seal [SEAL.] of the superior court of Baltimore City on the 5th day of September, A. D. 1864.

ALFORD MACE, *Clk.*

[U. S. 5-cent stamp.]

It is agreed that the statement of amounts paid by the defend-
25 ants to the said commissioners shall be taken as a part hereof as the same is annexed hereto.

It is agreed that should this case be taken to the Supreme Court of the United States on appeal, the ordinance of the Mayor and City Council of Baltimore, herein referred to, as well as the act of assembly confirming the same, may be read from the printed volumes of the ordinances and acts of assembly respectively.

It is also admitted that the plaintiffs are a public municipal corporation under the name of the Mayor and City Council of Baltimore.

It is also admitted that the paper hereto annexed, marked "$5,000,000 bond," is the bond issued by the Mayor and City Council of Baltimore, under the ordinance aforesaid.

WM. BRICE, *for Pl'ff.*
JOHN H. B. LATROBE, *for Def't.*

$5,000,000 *bond, City of Baltimore.*

No. —. $ ———.

Five million loan, 1890, six per cent.

This is to certify that the Mayor and City Council of Baltimore are indebted to me ———— in the sum of ——— dollars, redeemable on the first day of January, 1890, on the presentation and surrender of this certificate, with interest thereon in the meantime, at the rate of six per centum per annum, payable quarter-yearly, on the first days of January, April, June, and October in each year.

This certificate is issued by virtue of the ordinance of the Mayor and City Council of Baltimore, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five mill-

26 ions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," and is only transferable at the mayor's office in person or by attorney, and on the delivery of this certificate to the transferee.

In witness whereof, I, the mayor of the city of Baltimore, have hereunto set my hand and affixed the seal of the said corporation, this — day of ——, in the year of our Lord eighteen hundred and fifty ——.

Interest to commence from the —— day of ———, 18—.

Redeemable on the first day of January, 1890.

———— ————, *Mayor.*

———— ————, *Register.*

Countersigned and registered.

Whereupon the plaintiff, by his counsel, offered the following prayer for instructions to the jury:

Plaintiffs' prayer.

The plaintiffs pray the court to instruct the jury that the plaintiffs are not subject to the payment of the tax in question under the acts of Congress of July 1st, 1862, and that whether the defendants are subject to the tax and liable to pay it or not, the defendants cannot retain from the plaintiffs any part of the interest due them by reason of their obligation to pay tax due to the government.

Which the court rejected, but upon request of the defendants' counsel granted the following prayer:

Defendants' prayer.

27 The defendant, by his counsel, prays the court to instruct the jury that upon the facts in this cause, and upon the true construction of the act of Congress to provide internal revenue, &c., approved July 1st, 1862, the defendant was bound to pay to the United States the tax of three per cent. of the amount of interest due to the city on the mortgage which has been offered in evidence, and that if it has made such payment, it is proper to deduct it from the interest payable under the said mortgage to the said city, and that consequently the plaintiff cannot recover, and the verdict of the jury must be for the defendant.

To the granting of which prayer of the defendant, as well as to the refusal to grant the plaintiffs' prayer, the plaintiffs, by their counsel, prayed leave to except, and that the court would sign and seal this their bill of exception, which the court do this third day of December, in the year 1864.

WILLIAM F. GILES, [SEAL.]

And thereupon the said Mayor and City Council of Baltimore prays an appeal from the judgment aforesaid, so as aforesaid rendered, to the Supreme Court of the United States, and the same is granted it. It is therefore ordered by the court here that the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the said Supreme Court of the United States, and the same are transmitted to the said court accordingly.

And afterwards, to wit, on the fourth day of December, in the

28 year of our Lord one thousand eight hundred and sixty-eight, the said Mayor and City Council of Baltimore filed in the circuit court here the following mandate, to wit:

UNITED STATES OF AMERICA, ss:

{ SEAL'S PLACE. } The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Maryland, greeting:

Whereas lately, in the circuit court of the United States for the district of Maryland, before you, or some of you, in a cause between the Mayor and City Council of Baltimore, plaintiff, and the Baltimore and Ohio Railroad Company, defendant, wherein the judgment of the said circuit court entered in said cause was in favor of the said defendant, and against the said plaintiff, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States, by virtue of an appeal taken by the Mayor and City Council of Baltimore, fully and at large appears.

And whereas, in the present term of December, in the year of our Lord one thousand eight hundred and sixty-seven, the same cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was in part argued by counsel, and it appearing to the court here that this cause has been improperly brought here by appeal instead of writ of error. Whereupon it is now here considered and ordered by this court that this appeal be, and the same is hereby, dismissed for the want of jurisdiction. 11 Dec.

29 You therefore are hereby commanded that such proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Salmon P. Chase, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-seven.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

And now here, at this day, to wit, the fourth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, the said the Mayor and City Council of Baltimore, by William H. Norris and Robert D. Morrison, esquires, their attorneys, produced to the said circuit court here the writ of the said United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next; which said writ of error is in the words and of the tenor following, to wit:

30 THE UNITED STATES OF AMERICA, ss:

[SEAL.] The President of the United States to the judges of the circuit court of the United States for the fourth circuit in and for the Maryland district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between the Mayor and City Council of Baltimore, plaintiffs, and the

Baltimore and Ohio Railroad Company, defendant, a manifest error hath happened to the great damage of the said the Mayor and City Council of Baltimore, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court then and there to be held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable S. P. Chase, Chief Justice of our Su-
31 preme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued the 4th day of December, 1868.

JAMES W. CHEW,
Clerk Circuit Court.

32 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, the transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

33 The United States of America to the Baltimore and Ohio Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein the Mayor and City Council of Baltimore are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said the Mayor and City Council of Baltimore, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf.

Witness my hand this 21st day of December, in the year of our Lord one thousand eight hundred and sixty-eight.

WILLIAM F. GILES. [SEAL.]

Notice of the above citation acknowledged.

JOHN H. B. LATROBE,
For Balto. & Ohio R. R. Company.

34 I hereby certify that the aforegoing is truly taken and made from the record and proceedings of the circuit court aforesaid.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said circuit court this 26 day of January, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on record:) Maryland C. C. U. S. No. 269. The Mayor and City Council of Baltimore, plaintiffs in error, vs. the Baltimore and Ohio Railroad Company.

Filed 11th October, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 269, *December Term*, 1869.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

Brief for the Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

No. 269, *December Term*, 1869.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF MARYLAND.

Brief for the Plaintiffs in Error.

Brief and Points of Plaintiffs in Error.

The Baltimore and Ohio Railroad Company being in great pecuniary need, and being regarded by the corporation of Baltimore and the State of Maryland as engaged more in a work of public utility than of private speculation for stockholders, the corporation of Baltimore, at its December session, 1853, passed the ordinance which is recited in the following quoted law of the State of Maryland, the State ratifying such ordinance by said law, and imposing an additional condition on the Railroad Company. The Plaintiffs in Error, for the convenience of the Court, set out this law literally in the brief, remarking that no part of it is italicised as printed in the volume of laws, this having been done by counsel to point attention and facilitate reference:

Chapter 34—*Passed March* 1, 1854.

"An Act to confirm an ordinance of the Mayor and City Council of Baltimore, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, two hundred and eighteen miles distant from the city of Baltimore, and to confer upon said Mayor and City Council, and upon the Commissioners of Finance and the Register of said city, the powers necessary for carrying into effect the provisions of said ordinance."

WHEREAS, the Mayor and City Council of Baltimore, at a session held in December last, passed and in the terms following, that is to say:

SECTION 1. Be it enacted and ordained by the Mayor and City Council of Baltimore, That whenever the Baltimore and Ohio Railroad Company, by their officers legally authorized to act on their behalf in such matters, shall signify in writing, sealed with their corporate seal, their acceptance of the terms and provisions of this ordinance, and shall at the same time deposit with the Register of the city, a mortgage, (to be previously approved by the City Counsellor,) wherein said Company shall pledge all their real and personal estate, road or roads, the tolls and revenues, as security to the Mayor and City Council of Baltimore, for the payment as hereinafter provided, of the principal and of the interest of the loan hereby made, it shall be the duty of the Commissioners of Finance of the city of Baltimore, and they are hereby authorised to issue certificates of stock of the Mayor and City Council of Baltimore, with coupons or otherwise, in their discretion, to the amount of five millions of dollars, redeemable on the first day of January, eighteen hundred and ninety, the interest payable quarterly on the first day of January, April, July and October in each year, the said Commissioners likewise to use their discretion, whether to issue five per cent. sterling bonds, payable in London, or six per cent. currency, payable in the city of Baltimore, and shall proceed to sell the said bonds or certificates on the best terms which they can obtain therefor, not less than par, and in such sums as may be required by said Railroad Company, and pay over the proceeds thereof to the Register of the city; *and it is likewise understood and provided, that if the Commissioners of Finance shall at any time elect to issue five per cent. sterling bonds as aforesaid, the cost of exchange,*

commission to agent in London, and all other expenses incidental to such payment, shall be chargeable to and paid by the President and Directors of the Baltimore and Ohio Railroad Company aforesaid; and it is hereby further provided, that any and all expenses incident to the issue of any of the bonds, whether currency or sterling as aforesaid, shall in like manner be chargeable to and paid by the said Railroad Company.

SEC. 2. *And be it enacted*, That the City Register be, and he is hereby authorized to pay to the Baltimore and Ohio Railroad Company, the amount of money he may receive from time to time, from the Commissioners of Finance on account of the sale of said certificates, reserving ten per cent. thereof, to be used as a sinking fund to pay the principal of said loan at maturity.

SEC. 3. *And be it enacted*, That the said reservation of ten per cent., amounting to five hundred thousand dollars, shall by the Register of the city of Baltimore, with the quarterly interest thereon, be invested in the public debt of the city of Baltimore, and so from time to time, until the maturity of the bonds, when so much thereof as shall be necessary shall be applied to the payment of the principal sum of said bonds, and to release the said Company from all responsibility for the mortgage herein created, in so far as said sinking fund may be capable of paying the same; and the said mortgage as mentioned to be given by the said Baltimore and Ohio Railroad Company, in section first of this ordinance, *shall be recorded under the direction of the City Register, and at the expense of the said Company, in the proper offices of record, where such instruments are recorded in all counties, districts, cities or towns, whether in the State of Maryland or out of it, wherein said Company have any real or personal estate, road or roads, tolls or revenues, as mentioned in the first section of this ordinance.*

SEC. 4. *And be it enacted,* That if at the maturity of said bonds the said sinking fund shall have accumulated to an amount exceeding the principal sum of the loan authorised in this ordinance of five millions of dollars, the said excess shall be paid into the city treasury for the use of the city, and be applied to the extinguishing the internal improvement debt.

SEC. 5. *And be it enacted,* That the premium, if any, that may be received on account of the sale of the said certificates or bonds, shall be converted into a sinking fund and invested in the public debt of the city of Baltimore, and so from time to time, with the interest quarterly accruing, to be applied to the payment of the original internal improvement debt of the city.

SEC. 6. *And be it enacted, That the acceptance of this ordinance by the said Company, and the mortgage required to be given by said Company, shall be construed and understood as obligating the said Company to pay to the said Register the principal sum of five millions of dollars, issued under the provisions of this ordinance, less the amount of the sinking fund, and its accumulations, mentioned in the third section of this ordinance, at least one month before the day on which the certificates or bonds hereby directed to be issued shall become redeemable, and shall also pay to the said Register interest at the rate of six per cent. per annum, on the whole amount of said certificates or bonds so issued, quarterly and in advance, at least ten days previous to the first days of the several months aforesaid, on currency bonds, and thirty days previous to aforesaid first days on sterling bonds, which said payments shall commence to be made in advance of the first payments of interest which shall be required to be made by the Mayor and City Council of Baltimore on said certificates or bonds, and*

shall continue to be made as aforesaid, until the repayment of the said Company to the Mayor and City Council of Baltimore of the principal sums of money which shall or may be issued as aforesaid.

SEC. 7. *And be it enacted,* That the said Register shall procure a stamp with the words "Safety Fund Stock—not to be re-issued," legibly cut thereon, and shall cause the same to be fairly impressed across the face of each certificate of Baltimore city stock invested as aforesaid, and cause an entry of the said certificates to be made in the books of his office from time to time, as the same may come in his possession, and shall make an exhibit of the said entries and certificates to the committee annually appointed to examine the books and accounts of his office, which committee shall make such examination a part of their report to the City Council, stating the amount of said certificates and general condition of said safety fund.

SEC. 8. *And be it enacted, That in order to meet the present exigencies of the Baltimore and Ohio Railroad Company, when the Legislature of Maryland shall have confirmed this ordinance, the Register be and he is hereby authorised to borrow upon the faith of the Mayor and City Council of Baltimore the sum of one million of dollars, redeemable at pleasure, bearing interest at the rate of six per cent. per annum, payable quarterly, and pay the same to the said Company, and upon his receiving the amount of sales of the certificates as provided for in this ordinance, he shall repay the city with the interest accrued thereon from said amount of sales, in lieu of paying them over to said Company.*

SEC. 9. *And be it enacted,* That the ordinance entitled "An ordinance to guarantee the bonds of the Baltimore and Ohio Railroad Company," approved December the four-

teenth, eighteen hundred and fifty-three, be and the same is hereby repealed.

SEC. 10. *And be it enacted*, That this ordinance shall have no effect until confirmed by the next General Assembly of Maryland; Now, therefore,

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That the said above recited ordinance be and the same is hereby confirmed, and that full power be and the same is hereby conferred upon the Mayor and City Council of Baltimore, and upon the Commissioners of Finance and the Register of said city of Baltimore, *to carry into effect all the provisions of the said ordinance*, in the same manner, to all intents and purposes, as if the said Mayor and City Council had been previously to the passage of said ordinance authorized and empowered by an Act of the General Assembly of Maryland to enact an ordinance in the precise terms of the ordinance above recited at length, and to provide for carrying the same into effect.

SEC. 2. *And be it enacted*, That nothing in this Act or in the said ordinance contained, shall be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland now has in the revenue of the said Baltimore and Ohio Railroad Company, for loans heretofore made by the said State to the said Company, or for the interest now due or that may become due thereon, to the said State.

SEC. 3. *And be it enacted*, That this Act shall take effect from and after the date of its passage."

The Railroad Company, in the manner prescribed by the first section of the ordinance, accepted the terms and pro-

visions of the ordinance, and executed as collateral security the mortgage set forth on pages 9, 10, 11, of the printed record, and duly made the payments of interest to the city of Baltimore, required by the sixth section, to July 1, 1862.

On the first of July, 1862, Congress passed a tax and excise law, the 81st section of which enacted as follows:

"SEC. 81. *And be it further enacted*, That on and after the first day of July, eighteen hundred and sixty-two, any person or persons owning or possessing, or having the care or management of any railroad company or railroad corporation, being indebted for any sum or sums of money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is, or shall be, stipulated to be paid, or coupons representing the interest shall be or shall have been issued to be paid, and all dividends in scrip, or money, or sums of money thereafter declared due or payable to stockholders of any railroad company, as part of the earnings, profits, or gains of said companies, shall be subject to and pay a duty of three per centum on the amount of all such interest, or coupons, or dividends whenever the same shall be paid; and said railroad companies or railroad corporations, or any person or persons owning, possessing, or having the care or management of any railroad company or railroad corporation, are hereby authorized and required to deduct and withhold from all payments made to any person, persons, or party, after the first day of July, as aforesaid, on account of any interest, or coupons, or dividends due and payable as aforesaid, the said duty or sum of three per centum; and the duties deducted as aforesaid, and certified by the president or other proper officer of said company or corporation, shall be a receipt and discharge, according to the amount thereof, of said railroad companies or railroad corporations, and the owners, possessors, and agents thereof, on dividends

and on bonds or other evidences of their indebtedness, upon which interest or coupons are payable, holden by any person or party whatsoever, &c."—(12 U. S. Stats, 469.)

On the first of October, 1863, and quarterly thereafter until the bringing of suit by the Plaintiffs in Error, the Railroad Company deducted three per cent. from its payment of interest, alleging that the internal revenue officers claimed and exacted the deduction under the provisions of the above Act of Congress. The city of Baltimore disputed the legality of the abatement, and brought suit on the contract arising from the acceptance of the ordinance, in the Superior Court of Baltimore city, on the third day of September, 1864, against the Railroad Company. (Printed record, 3.)

The declaration contained two counts, the first setting forth the legal effect of the sixth section of the ordinance, with a detailed *inducement* of the circumstances of the original loan and contract, and claiming the whole amount of six quarterly dues of interest, of seventy-five thousand dollars each, beginning ten days before the first of October, 1862, and including, with the intermediate quarterly instalments, that which fell due in ten days before the first of July, 1864.

The second count omitted much of the inducement, and stated generally the obligation to pay by virtue of the loan and acceptance of the ordinance, and set forth the default in the same terms and in respect to the same quarterly dues which had been specified in the first count.—(Printed record, 3, 4, 5.)

The defendant appeared and on the 24th of October, 1864, (printed record, 6, 7) a writ of *certiorari* from the Circuit Court of the United States for the District of Maryland, was filed in the Superior Court of Baltimore City, commanding

the removal of the record of the suit to the said Circuit Court, which removal was accordingly ordered by the Judge of the Superior Court.

On pages 1 and 2 of the printed record, will be found the petition and proceedings of the Circuit Court at the time of issuing the *certiorari*.

The record being duly removed into the Circuit Court, the defendant pleaded the general issue, and the case went to trial on the following admission of facts and agreements, to be found on pages 8, 9, 12, 13, of the printed record :

"It is agreed, 1. That the Mayor and City Council of Baltimore, having full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27, 1853, entitled 'An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore.'

2. That said ordinance may be read in evidence on the trial of the above cause, from the printed ordinances of the city.

3. That in pursuance of the provisions of the said ordinance, the certificates of stock of the Mayor and City Council of Baltimore, and the payments provided for in the 2d section, were made to the defendants, reserving the ten per cent. to be used as a sinking fund.

4. That the Baltimore and Ohio Railroad Company have, since the issue of said certificates of stock, paid regularly to the register of the city of Baltimore the interest on the whole amount of five millions dollars, issued under said ordinance, until the first day of July, in the year 1863.

5. That since the date last aforesaid the said company, in paying the interest on the said certificates to the said regis-

ter, have deducted three per cent. therefrom, which deduction they have paid to the Commissioner of Internal Revenue of the United States, upon his peremptory demand therefor, he insisting that he was entitled thereto upon a proper construction of the acts of Congress of the United States, to provide internal revenue to support the government, &c.

6. That the payments thus made to the Commissioner of Internal Revenue were not made until after repeated correspondence, in which the defendants sought to prove that he was wrong in making the demand, and was only paid to avoid the consequences provided for in the act, in case of refusal.

7. That the payments thus made to the Commissioner, and withheld from the plaintiffs, amount at this time to the sum of $18,000, which this action is brought to recover as being withheld without authority, and in violation of the obligations entered into by the company, not only in accepting said ordinance and receiving the proceeds, less ten per cent. of the sales of the stock certificates, but in executing the mortgage provided for in the said ordinance, and which it is admitted was duly executed on the 16th February, 1854, and which it is agreed may be read in evidence from the original paper or a certified copy.

It is agreed that the statement of amounts paid by the defendants to the said commissioners shall be taken as a part hereof as the same is annexed hereto.

It is agreed that should this case be taken to the Supreme Court of the United States on appeal, the ordinance of the Mayor and City Council of Baltimore, herein referred to, as well as the act of assembly confirming the same, may be read from the printed volumes of the ordinances and acts of assembly respectively.

It is also admitted that the plaintiffs are a public municipal corporation under the name of the Mayor and City Council of Baltimore.

It is also admitted that the paper hereto annexed, marked '$5,000,000 bond,' is the bond issued by the Mayor and City Council of Baltimore, under the ordinance aforesaid."

WM. PRICE, *for Pl'ff.*
JOHN H. B. LATROBE, *for Def't.*

"$5,000,000 *bond, City of Baltimore.*

No. —. $———.

Five million loan, 1890, six per cent.

This is to certify, that the Mayor and City Council of Baltimore are indebted to ——— in the sum of ——— dollars, redeemable on the first day of January, 1890, on the presentation and surrender of this certificate, with interest thereon in the meantime, at the rate of six per centum per annum, payable quarter-yearly, on the first days of January, April, June and October, in each year.

This certificate is issued by virtue of the ordinance of the Mayor and City Council of Baltimore, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," and is only transferable at the Mayor's office in person or by attorney, and on the delivery of this certificate to the transferee.

In witness whereof, I, the Mayor of the city of Baltimore, have hereunto set my hand and affixed the seal of the said corporation, this —— day of ——, in the year of our Lord eighteen hundred and fifty ——.

Interest to commence from the —— day of ———, 18—.

Redeemable on the first day of January, 1890.

———, *Mayor.*
———, *Register.*"

A certified copy of the mortgage was also given in evidence, (to be found on pages 9, 10, 11, 12 of the printed record.)

On this state of the case, the plaintiff offered the following prayer, which the Court rejected, (printed record, 13.)

PLAINTIFFS' PRAYER.

"The plaintiffs pray the court to instruct the jury that the plaintiffs are not subject to the payment of the tax in question under the acts of Congress of July 1, 1862, and that whether the defendants are subject to the tax and liable to pay it or not, the defendants cannot retain from the plaintiffs any part of the interest due them by reason of their obligation to pay tax due to the government."

And the defendant prayed the Court as follows:

DEFENDANTS' PRAYER.

"The defendant, by his counsel, prays the court to instruct the jury that upon the facts in this cause, and upon the true construction of the act of Congress to provide internal revenue, &c., approved July 1, 1862, the defendant was bound to pay to the United States the tax of three per cent. of the amount of interest due to the city on the mortgage which has been offered in evidence, and that if it has made such payment, it is proper to deduct it from the interest payable under the said mortgage to the said city, and that consequently the plaintiff cannot recover, and the verdict of the jury must be for the defendant."

This prayer the Court granted, and the plaintiffs excepted to the refusal of their prayer and the granting of that of the defendant, (printed record, 13.)

The plaintiffs, the verdict and judgment being against them, prayed an appeal to this Court.

At the December term, 1867, the Supreme Court dismissed the *appeal*, as the cause should have been properly brought before it by writ of error.

A writ of error was accordingly issued on the fourth day of December, 1868, (printed record, 14, 15) and citation duly issued and served, and the record was filed in this Court on the eleventh of October, 1869, (printed record, 16.)

The Plaintiffs in Error ask a reversal of this judgment for the following reasons:

I.—Because, had this been a transaction between *private* parties, the circumstances of the case show that the position of the city in relation to the railroad was not to be more onerous than that of a surety. It will be observed that the form originally intended was that the road should issue bonds and the city guarantee them. But, on account of the greater market value of municipal bonds, this form was changed to a direct issue of bonds by the city, creating no contract between the bondholders and the road company, and a mortgage by the road to the city to secure the furnishing of the interest in advance to the city on those bonds, and quarterly instalments for the creation of a sinking fund for the redemption of the principal of the bonds.

Independently therefore of express stipulations, by the nature of the transactions, the road company was bound to indemnify the city, as if the form of principal and surety had been carried out. By that relation, the situation of a surety can never be more onerous than that of the principal.

Burge on Suretyship 5—6.
Chitty on Cont. 522.
Mr. Justice Nelson, in United States vs. Allsbury. 4 Wal. 186.
1 Hilliard on Real Prop. 407.
Pollard vs. Herries. 3 Bos. & Pul. 341—2.
Chitty on Cont. 504.
Holmes vs. Weed. 19 Barb. 128.

The possibility of taxation should have been foreseen by the principal, and it is a part of his obligation to indemnify the surety.

Maltby vs Reading & Columbia R. R. Co. 52 Pa. 148—9.

If there is any hardship in the taxation, it is one which the borrower contracted to bear, and is a part of the obligation of his contract.

Dermott vs. Jones. 2 Wal. 8.
United States vs. Keehler. 9 Wal. 88.

II.—In this case the express contract of the parties provided "that any or all expenses incident to the issue of any of the bonds, whether currency or sterling, as aforesaid, shall *in like manner* be chargeable to and paid by the said railroad company."

Sec. 1 of Ordinance and Law, last clause, *ante*, p. 5.
Catawissa R. R. Co. vs. Titus. 49 Pa. 277—281.

Congress never intended to give the power to deduct the tax by the debtor when the debtor had contracted to pay all expenses incidental to the loan. It did not propose to alter contracts, but merely to use the debtor as an agency to collect the tax from the creditor whom it intended to tax.

Accordingly, as soon as it was perceived that these debtors were misinterpreting the intended right of deduction, in cases where they had contracted to pay all taxes, &c., Congress made its purposes more distinct by the act of June 30, 1864, § 122, as follows:

"And the payment of the amount of said duty so deducted from the interest or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, *except where said companies may have contracted otherwise.*"

13 U. S. Stats. 284.

In this case the railroad company has "contracted otherwise." The engagement set forth in the final clause of the first section of the ordinance is no usual covenant in a mortgage indemnifying the mortgagee against taxes incurred whilst the mortgagor is in possession, but is a compact between borrower and lender by which the borrower stipulates to pay principal and interest free of all abatements.

Haight vs. The Railroad. 6 Wal. 17—18.

III.—The tax was not to be deducted in this case, because Congress did not intend double taxation of the same fund. It was only using railroads and other private corporations as agencies to collect the tax on income where such income was liable to taxation, and where the collecting agencies had those relations with the parties liable to the tax which enabled them as debtors to plead the deduction in discharge of that amount of the dividend, &c.

But in this case Congress had no right to use *municipalities* as agencies for collection—they being political bodies not liable to their service. Accordingly, no power was given to the municipality to deduct the tax from the holders of its bonds, for it was not attempted to employ it as a collecting agency. It paid full interest to its bondholders without abatement. They were not credited in their income returns with any deductions, and therefore were taxed on this fund. Is the fund to be double-taxed?

Haight vs. The Railroad. 6 Wal. 17—18.

IV.—The city, in the exercise of a governmental function expressly delegated by the State, had issued its bonds and borrowed money of the purchasers, which was brought into the municipal treasury. The repayment of those bonds was secured by the delegated power of taxation. For the promotion of a public purpose—"a State object"—constitutionally adequate to justify taxation, the money thus raised was,

under a specific scheme for its reimbursement, loaned to a private corporation as an agency to effect this public purpose. The money of the public was contracted to be reimbursed by the railroad's acceptance of the ordinance authorizing the loan on the terms therein set forth. The performance of this contract was collaterally secured by the mortgage executed by the borrower to the city. The debt, by being thus due to the territorial political agency of the State, is due to the State, so as not to be taxable by the National Government, and it is to be assumed was not intended to be taxed by the Internal Revenue Act.

This point involves three propositions:

First. That though the eighty-first section of the act of 1862 directed the railroad companies and other collecting agencies to "deduct and withhold from all payments made to *any person, persons or party,*" the duty of three per centum, the generality of these words is to be restrained so as not to impute to Congress an intent to violate the rights which were reserved to the States, both by the character of the Federal Union and the express clauses of the Constitution.

Second. That if Congress had any purpose to tax the property and income of the States, in their sovereign ownership, such purpose is null and void.

Third. That the money of a State municipality, raised on the pledge of a delegated power of taxation, and loaned to a private corporation to advance a public object, is a debt protected from Federal taxation by the immunities of the State.

As to first proposition, this Court has said:

* * * "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect Union by substituting a National Government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved. The general condition was well stated by Mr. Madison, in the Federalist, thus: 'The Federal and State governments are, in fact, but different agents and trustees of the people, constituted with different powers and designated for different purposes.'

"Now to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government."

Lane County vs. Oregon. 7 Wal. 76.

"If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind—that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is certainly a reasonable conclusion that Congress did not intend by the general terms of the currency acts to restrain the exercise of this power in the manner shown by the statutes of Oregon."—*Ibid.*

"We cannot attribute to the legislature an intent to include taxes under the term debts, without something more than appears in the acts to show that intention."—*Ibid.*

Similar principles of interpretation were adopted in the case of United States *vs.* Kirby, 7 Wal., 486–7.

"Indeed, it may be doubted whether it is competent for Congress to exempt the employees of the United States from arrest on criminal process from the State courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."—See also Mayor, &c. *vs.* Balt. & O. R. R. 6 Gill, 298.

The Constitution in its taxing power, like the war power, is not intended to act on States.

Prize Cases. 2 Black. 668.

That the Constitution is intended to act upon citizens, and not upon States, is further shown by the fact that direct taxes are imposed by the Census enumeration.

Second proposition—That if taxation of State property was intended, so far the law is unconstitutional.

States are entitled to have property and to borrow money by the issue of securities, and to invest money free from Federal taxation, if this is done for governmental purposes, so as not to interfere with other Federal powers than that to levy and collect taxes. State powers are so far correlative with Federal powers.

Weston vs. City of Charleston. 2 Peters, 467.
The Banks vs. The Mayor. 7 Wal. 24.
Bank vs. Supervisors. 7 Wal. 28.
Veazie Bank vs. Fenno. 8 Wal. 547.
Thompson vs. Pacific R. Road Co. 9 Wal. 587.
Bank of Commerce vs. Commissioners. 2 Black. 620,

Aid to a railroad is a governmental purpose authorizing taxation.

Rogers vs. Burlington, 3 Wal. 663—4.

There is nothing in the principles of the following authorities to justify this taxation of the money which was collaterally secured by the mortgage in this case.

National Bank vs. Commonwealth. 9 Wal. 353.
Lionberger vs. Rouse. *Ib.* 468.
Thompson vs. Pacific R. R. Co. *Ib.* 591.
Briscoe vs. Bank of Kentucky. 11 Peters, 317—348.
Darrington vs. Bank of Alabama. 13 How. 12.

In a case like the present, a power to tax is a power to destroy, and is unconstitutional.

Jelison vs. Lee. 3 Woodb. & M. 376.
Fifield & Close. 15 Mich. 505 to 510.
Jones vs. Estate of Keep. 19 Wis. 372.
Warren vs. Paul. 22 Ind. 276.
Union Bank vs. Hill. 3 Coldwell (Tenn.) 325.
Sowell vs. Sowell. 40 Alabama, 243.
State vs. Garton. Indiana, November, 1869.

Third proposition—That the money of a State municipality, raised on a delegated power of taxation, and loaned to a private corporation to advance a govermental purpose,

is a debt protected from Federal taxation by the immunities of the State.

Rogers vs. Burlington. 3 Wal. 663, 4, 5.
Mayor, &c. vs. Balt. & O. R. R. Co. 6 Gill, 296, 7.
Same vs. Same. 21 Md. 91.
Mayor &c. vs. Groshon. 30 Md. 444.
East Hartford vs. Hartford Bridge Co. 10 How. 511.
State Bank of Ohio vs. Knoop. 16 How. 369.
Mayor, &c. vs, The State. 15 Md. 462—4.
State vs. Balt. & O. R. R. 12 G. & J. 436.
Same Case. 3 How. 550.

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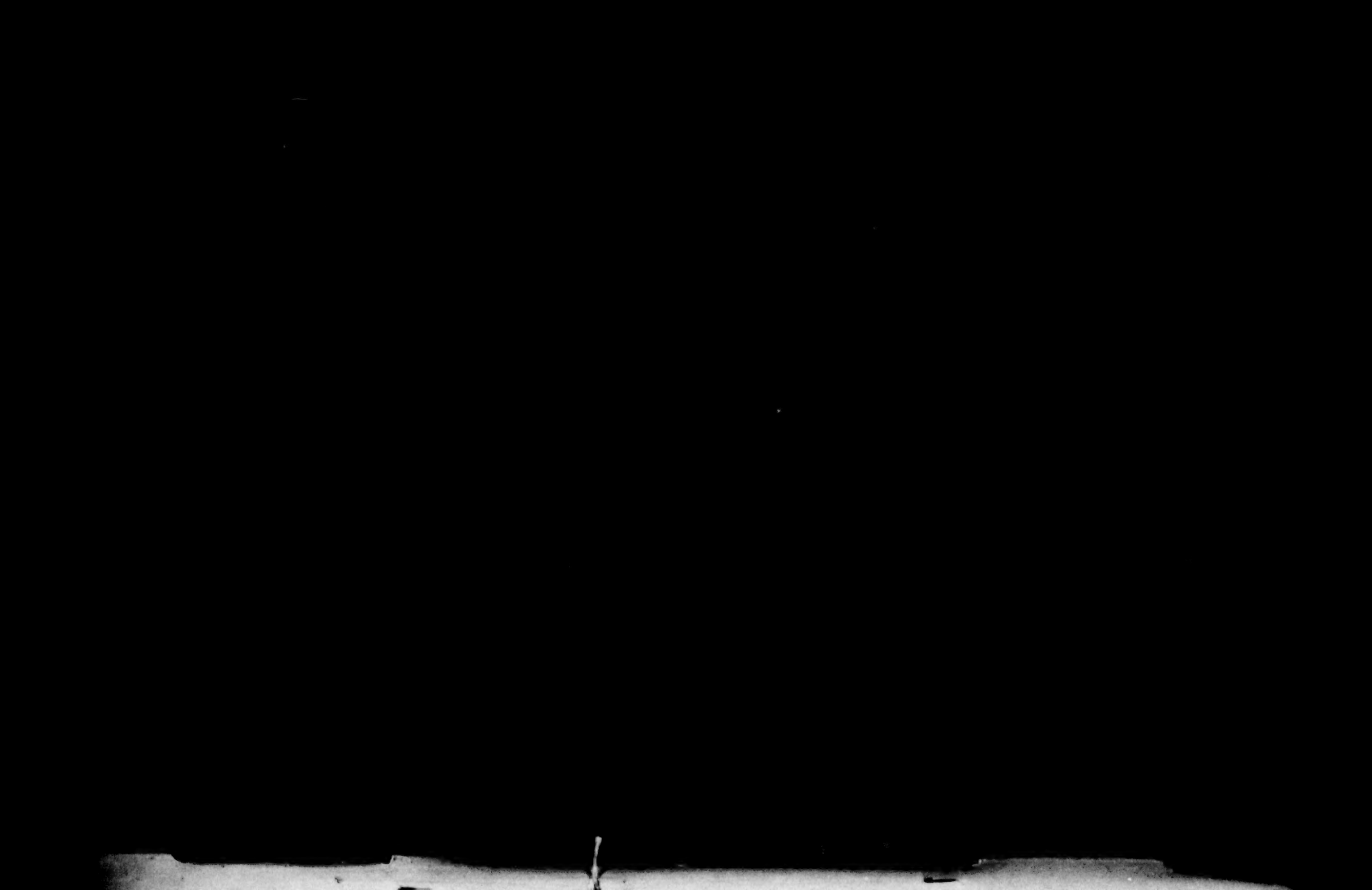

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IN THE

Supreme Court of the United States.

In Error from the Circuit Court of the United States for the District of Maryland.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAIL ROAD COMPANY,
DEFENDANTS IN ERROR.

IN THE

Supreme Court of the United States.

In Error from the Circuit Court of the United States for the District of Maryland.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,

PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAIL ROAD COMPANY,

DEFENDANTS IN ERROR.

THE facts of this case are in brief compass.

The Baltimore and Ohio Rail Road, being incomplete in many respects, the Mayor and City Council of Baltimore agreed to lend the Company $4,500,000; and, to raise the money for the purpose, issued the bonds of the City for $5,000,000, payable, with interest, semi-annually, in the mean while, in 1890. The Rail Road Company mortgaged its property of all sorts to the City, to secure the payment of the principal and interest of the bonds, the City retaining in its keeping $500,000, as a sinking fund, in addition.

The City paid the Company the sums required by it, as demanded, and the Company paid the City the interest on the $5,000,000, without deduction, until after the passage of the internal revenue law of 1862; when the Commissioner of Internal Revenue, insisting that the Company's mortgage was an "evidence of indebtedness," within the meaning of the act,

obliged it to pay the income tax thereon, to avoid distress. This tax the Company, then, deducted from the interest payments to the City; the latter demurred; there was a joint and unsuccessful attempt to satisfy the Commissioner that the case did not fall within the scope of the act of 1862; and the Company, still refusing to pay to the City what had been paid already to the Commissioner of Internal Revenue, the latter brought an action for the amount in the State Courts of Maryland: this was removed by *certiorari* to the United States Court, where the decision being against the City, the present writ of error was sued out, and the matter is now before this Court for its final determination.

Two questions arise:

First.—Is the case one that falls within the scope of the act of 1862—known as the internal revenue law.

Second.—If it is, and the United States have the right to demand the payment of the tax in question, is the Baltimore and Ohio Rail Road Company bound, having paid it, to pay to the City of Baltimore the interest on the $5,000,000 debt aforesaid, without deducting it?

First.—On the first point the counsel for the Plaintiff and the counsel for the Defendant in Error are both agreed. They hold the tax to be an unlawful exaction.

The argument on this point will be left to the counsel for the Plaintiff in Error; with the single observation that the very full brief that is submitted on the part of the Mayor and City Council meets with the entire concurrence of the counsel for the Defendant in Error, who has nothing to add to it.

Second.—The real difficulty, as between the Plaintiff and the Defendant in Error, arises under the second point, and becomes important only in the event of the first point being decided in the affirmative.

We proceed to inquire, then, whether the Rail Road Company, having paid the tax to the United States, is bound to pay to the City the full amount of interest on the $5,000,000, without deducting it?

In the Court below, it was determined that the Company was authorized to make the deduction.

The relations in this connection between the Mayor and City Council of Baltimore and the Baltimore and Ohio Rail Road Company, grow out of a contract between them based upon an ordinance of the former, sanctioned by the General Assembly of Maryland.

The Defendant in Error insists that the solution of the question depends on the language of the contract, which is clear and explicit, defining accurately the rights and obligations of the respective parties. It is to be found in the mortgage from the Rail Road Company to the City, and is as follows.—(*See Record, page* 10.)

After reciting the facts here stated in detail, the defeasance clause of the mortgage is as follows:

"And if the said Baltimore and Ohio Rail Road Company do and shall, well and truly, in the event of the said Commissioners electing to issue five per cent. sterling bonds, pay all other expenses incidental to such payment, as well as all and any expense incidental to the issue of any of the bonds, whether currency or sterling, as aforesaid, and shall pay the expense of recording, under the direction of the City Register, this indenture of mortgage, in the proper offices of record where such instruments are recorded, in all counties, districts, cities or towns, whether in the State of Maryland or out of it, wherein said Company have any real or personal estate, road or roads, tolls or revenues, then and in these events, these presents shall be null and void."

It will be seen at once that the obligation of the Defendant in Error to pay to the City the full amount of interest, without deduction, must turn upon the meaning that the Court shall give to the words, "and shall pay * * all and any expense incidental to the issue of any of the bonds, whether currency or sterling."

The mortgage bears date February 16th, 1854—at which time there was no income tax or any reasonable expectation of one—and the Defendant in Error insists that the expenses incident to the issue of the bonds were such as related to the preparation of them, and such books and clerk hire as might be required in connection with them.

That this is the effect of the words, as they stand, seems to be too plain to require, or even admit of, argument. The question is, in this aspect, one of grammar rather than of law.

But it was contended in the Court below, and may be contended in the same way here, that looking to the facts of this case, as exhibited on the record, the relations of the parties litigant to the $5,000,000 loan, commonly so called, were those of principal and surety—the Defendant in Error being the principal and the Mayor and City Council the surety; and those cases may be cited again, which seem to establish it as a rule of law, that the surety shall not be prejudiced by contingencies not anticipated at the time of creating the relation.

Now, while this doctrine is by no means admitted to the extent of vacating a special contract creating the relation and such as exists in the present case, where the parties themselves declare what shall be their respective rights and liabilities,—yet it is based upon what is believed to be a total misconception of the relation created by the mortgage.

The Defendant in Error holds, in other words, that all the facts in the case go to show that the Plaintiff in Error is the principal and not the surety in this transaction. It is not difficult to make this apparent.

We all know as matter of history that the Baltimore and Ohio Rail Road was the first work of the kind conceived, commenced and completed in the United States; and that it originated in a desire to preserve a share, at least, of the trade of the country west of the Alleganies, of which internal improvements centering in other Atlantic and rival cities threatened to deprive it. It was a matter of life and death to Baltimore, as a municipal corporation, as well as to its individual citizens; and both hastened to subscribe millions to its capital stock. The means of neither were competent to the undertaking, and both united to secure its accomplishment. This state of things must not be lost sight of. It affords the key to what might otherwise be unintelligible—the agreement of the Mayor and City Council to make the cash advance of $4,500,000 above mentioned.

In 1853, the condition of the road of the Defendant in Error is to be inferred from the title to the ordinance authorizing the advance, which is as follows:

"An ordinance to aid the Baltimore and Ohio Rail Road Company by a loan to the amount of $5,000,000, to complete their road to the City of Wheeling, to fund their debts, and especially

to lay a second track as far as Piedmont, 218 miles distant from Baltimore."

An incomplete road, in debt, and requiring the facility of a double track for a part of its length, was to be relieved from its difficulties by the action of its principal stockholder.

But, while the title of the ordinance states its object, its legal effect is to be ascertained by a reference to the enacting clauses.

Turning to the first section, we find that the Commissioners of Finance were to issue certificates of City stock, which were to be sold by the Commissioners themselves at not less than par, and the proceeds paid to the Register of the City. With the funds thus on hand, the Register was to pay to the Baltimore and Ohio Rail Road Company the amount that might be required by it, and received by him from the Commissioners of Finance, reserving ten per cent. to be used as a sinking fund to redeem the principal at maturity: the result being that the Company, instead of receiving the entire amount of the loan of $5,000,000, received but $4,500,000 for the purposes indicated in the title to the ordinance.

Had the City guaranteed bonds issued by the Rail Road Company, had it even placed its own bonds loaned to the Company, in the hands of the latter, there might be some ground, perhaps, for saying that the City occupied the place of a surety only. But, when besides issuing its own bonds, the City retained the possession of them, and sold them only when required to pay from time to time the moneys wanted by the Company, it really seems difficult to give to it any other character than that of a principal borrowing money to lend it again, to aid in the promotion of an object in which it was deeply and principally interested.

Nor is this all that is to be urged in this connection to show that the City was a principal in the matter.

Had the ordinance provided that the mortgage should be released or become void so soon as the accumulations of the sinking fund amounted to the entire debt of $5,000,000, there might still have been found room to argue, if nothing more, that the City was a surety only, having no interest but to secure itself from loss.

This is not so, however. The ordinance shows most conclusively, that so far as the City is concerned, the transaction in one aspect is for the City's own and peculiar benefit apart from the Baltimore and Ohio Rail Road Company altogether.

The five million loan, so-called, was not the only one, by any means, made by Baltimore to pay its subscriptions or afford its aid to works of internal improvement; nor did the Mayor and City Council lose sight of these in the ordinance in question, as appears by the fourth and fifth sections, which are in the following words :

"If, at the maturity of said bonds, the sinking fund shall have accumulated to an amount exceeding the principal sum of the loan authorized of five millions of dollars, the said excess shall be paid into the City treasury, for the use of the City, and be applied to the extinguishing the internal improvement debt." *Section* 4.

"The premium, if any, that may be received on account of the sale of the said certificates or bonds, shall be converted into a sinking fund and invested in the public debt of the City of Baltimore, and so from time to time, with the interest quarterly accruing, to be applied to the payment of the original internal improvement debt of the city." *Section* 5.

So far, therefore, from the transaction in question being like unto a common suretyship, the issue of the bonds of the City on this occasion was intended, most evidently, as an operation by which the City, in all probability, if the Commissioners of Finance performed their duty by making judicious investments, would be a gainer, and be furnished with the means of discharging an indebtedness with which the Baltimore and Ohio Rail Road Company was wholly unconnected—being the general internal improvement debt of the City.*

The mortgage, therefore, out of which the obligations of the Defendant in Error, whatever they may be, arise, contains nothing that in terms binds them to pay the United States tax without afterwards deducting it from the interest payable to the City. There is nothing in the facts of the case, as disclosed by the evidence that justifies the implication that would place the Defendant in Error in the situation of principal in the transaction, while the Plaintiff in Error occupies that of surety, so as to subject the former to those liabilities that it has been urged,

* By the ordinance the Commissioners of Finance were required to invest the interest and premium, if any, received by them in the public debt of the City. Now, if the calculation which fixed the amount of the sinking fund and the length of the loan was based upon sales and purchases at par, the ability of the Finance Commissioners to invest at rates 8 and 10 per cent. below par, (which they have been able to do,) would leave a very large surplus in the hands of the City in 1890, to be applied to its general indebtedness.

in the Court below, and will be urged again here, attach to the principal in ordinary cases of Principal and Surety.

And even were this not apparent, from the considerations already urged, it is insisted that whatever may be the general law affecting parties to an agreement in the relations into which they propose to enter, it is always in their power to modify it by special contract; and it is contended that they have so modified it here by the provision in the contract which makes the Defendant in Error responsible for *expenses incidental to the issue* of the bonds alone.

If the first of the points above suggested is decided in the negative, and it should be held that the Act of 1862 is not applicable here, there is an end of the case.

If the second point is decided in favor of the Defendant in Error, the judgment of the Court below must be affirmed.

JNO. H. B. LATROBE,
For Defendant in Error.